Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

LE BON BRUCE WALKER,
Petitioner,

v.

NEIL SELDMAN
ELIZABETH MENIST, ESQUIRE
DIANE STEWART,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do controversies over real property in the District of Columbia constitute controversies over takings strictly regulated by the provisions under the Fifth Amendment to the United States Constitution?

2. In controversies over real property, should it be required that the District of Columbia Courts originating under Article III Section 2 of the United States Constitution enforce the due process provisions under the Fifth Amendment to also include the absolute right to counsel?

3. In territories of the United States that are not States, is the Fifth Amendment to the United States Constitution which does not include the Equal Protection of the Laws Clause inherent under the Fourteenth Amendment a valid exercise of Congress' power to enforce the due process rights of the residents in civil issues?

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PARTIES TO THE PROCEEDING

The names of the parties to this proceeding are Le Bon Bruce Walker, Petitioner (hereinafter called "Walker"). Petitioner also owned improved real property located at 1922 3rd Street, NW, Washington DC ("the property"). Neil Seldman (hereinafter called "Seldman") who held a deed of trust secured by the property and who directed the Substitute Trustees to foreclose on Walker's property. Substitute Trustees Elizbeth Menist, Esquire (hereinafter called "Menist") and Diane Stewart (hereinafter called Stewart), who foreclosed on the property and issued a Substitute Trustees Deed to Seldman.

JURISDICTIONAL STATEMENT

Petitioner, Walker, noted an appeal on April 24, 2006 of to the DC Court of Appeals from the Order of the DC Superior entered on April 13, 2006 dismissing Walker's case with prejudice, entering judgment for attorney's fees and costs and releasing the Notice of *lis pendens* filed in civil action case No 03-CA-3882. On August 10, 2006, the DC Court of Appeals entered an Order summarily affirming the trial court's Order of April 13, 2006.

Walker filed a Petition for Rehearing or Rehearing En Banc seeking reconsideration of the Order of the DC Court of Appeals granting summary affirmance by the Division and/or by the full Court. On November 3, 2006, the Appellate Court denied the Petition for Rehearing or Rehearing En Banc. The DC Court of Appeals also entered an Order, on November 10, 2006, staying the issuance of its mandate pending the filing of a petition for a writ of certiorari to this Court.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C.. §1254(l).

Jurisdiction is also invoked upon this Court under Article III, Section 2, Clause 2 of the United States Constitution which states in pertinent part:

> "In all other cases before mentioned, the Supreme Court *shall have appellate Jurisdiction* both as to the Law and Fact . . ."

The Fifth Amendment to the U.S. Constitution which states in relevant part:

> "No person shall ... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

This case grew out of a foreclosure sale on Walker's real property by Seldman and his Substitute Trustees, Menist and Stewart. The property was Walker's residential property. In November 1999, Walker and his former wife (who joined for the sole and limited purpose of waiver of dower) purchased the property and on January 27, 2000, Seldman loaned Walker the principal sum of One Hundred Seventy Four Thousand U.S. dollars ($174,000.00). Walker executed a promissory note spelling out the terms of repayment and interest. Petitioner also executed a deed of trust on the property as security for the note. Walker borrowed the money to *inter alia* invest in a business venture.

On or about June 7, 2000, Seldman and Walker became business partners and formed Seldman-Walker, LLC for the

purposes of owning, operating, renovating, and developing real property in the District of Columbia. Seldman-Walker, LLC later became SELKER, LLC in June of 2001.[1] In May, 2001, Walker was incarcerated at the Jessup Correctional Institution in Jessup MD. Seldman and Walker remained in contact with each other about SELKER's affairs and Walker trusted Seldman to facilitate a means for him to maintain the payments towards the mortgage on Petitioner's residential property, during his incarceration.[2]

Walker defaulted on his residential loan shortly after his

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[1] Originally Walker was the managing member of Seldman-Walker, LLC and the shares in the Company were divided with Walker having 70% and Seldman having 30%. In June 2001, Walker relinquished his managerial duties of SELKER, LLC to Seldman because of his incarceration and agreed to sell Seldman 20% of his shares as a result. Walker and Seldman executed an Amended Operating Agreement naming Seldman as managing member and making the ownership interests in the Company 50% for Walker and 50% for Seldman. Walker avers that Seldman never gave any consideration for his additional shares.

[2] The property wherein Walker resided that was encumbered by the lien in favor of Seldman was also a source of rental income for Petitioner. Walker renovated his property by changing the floor plan to include ten large bedroom suites made up of a single room with a snack preparation bar and some having a combination small refrigerator and stove. When Walker became incarcerated, Seldman collected the rents from the tenants, but failed to credit the rental payments towards the outstanding mortgage.

incarceration and on January 15, 2002 Seldman directed his Substitute Trustees to foreclose on the property. The following facts are important with respect to the foreclosure sale. On or about November 28, 2001, Seldman sent Walker a letter requesting that Petitioner "cure his alleged default by tendering payment of all arrearages in full with interest under the note as of the date of payment along with a sum sufficient to pay accrued costs and attorneys fees". The letter further instructed Walker to contact Seldman before tendering any money to cure the default for the correct pay off figure. On or about December 15, 26, and 29, 2001, Walker mailed three letters to Seldman informing Seldman of his (Walker's) right to cure or reinstate his residential mortgage (DC Code § 42-815.01) and requesting that Respondent tell him the amount needed to cure the default. Seldman did not respond to any of these requests by Petitioner. On January 20, 2002, Walker received a letter from Seldman's attorney dated December 27, 2001, informing Petitioner that he had to pay the entire amount of the note plus interest, attorney fees and costs. Seldman foreclosed on Walker's residential property without giving him the right to cure his residential default by paying the back mortgage payments, pursuant to DC Code §42-815.01.[3]

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[3] Walker notes here that Seldman not only foreclosed on his residential property without the right to reinstate his residential loan, he also liquidated during the same period all of the real estate belonging to SELKER, LLC, without any written resolution from Walker as required. Under DC Code

On May 12, 2003, Petitioner filed a Verified Complaint in the DC Superior Court against Seldman, Menist and Stewart and the original Trustees alleging wrongful foreclosure, conspiracy to commit fraud, collusion and unjust enrichment, breach of contract and damages. The action assigned DC Super Ct. Case No. 03-CA-3882 alleged *inter alia* that Seldman along with Walker's former employee Carol McIntyre misappropriated the rents from the property and that Seldman, Menist and Stewart illegally foreclosed on the property without giving Walker the right to cure his default on his residential mortgage loan. The Verified Complaint also alleged that Seldman failed to compensate Walker for the additional shares of SELKER and that Seldman mismanaged SELKER's funds and real property and failed to give Walker any accounting, pursuant to his duties as manager.[4]

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§29, et. seq., this is a requirement for dissolution of assets belonging to entities and corporations in the District of Columbia. Litigation involving SELKER, LLC is currently pending in the DC Superior Court (No. 04-CA-4631) and in the U.S. District Court for the District of Columbia. (06-CV-0603 (G.K.)).

[4] Menist and Stewart as mentioned earlier, issued a Substitute Trustee's Deed to Seldman following the foreclosure. Seldman took over the property and moved SELKER, LLC's Offices into the residence. Seldman then obtained a loan for $350,000.00 and executed a deed of trust secured by the property. It is unclear whether Seldman placed Walker's residential property into SELKER, LLC; however, Walker on information and belief contends that Seldman

Walker prayed for the following relief: (1) that the trial court strike the foreclosure notice as invalid and vacate the transfer of title to the property; (2) prevent and/or set aside any sale of the property or transfer of title pending the litigation; (3) void the Substitute Trustee's Deed as fraudulently conveyed; (4) grant compensatory and actual damages in the amount of 50% of the value of the assets of SELKER, LLC; (5) grant compensatory and actual damages in the amount of One Million Dollars ($1,000,000.00); (6) grant punitive damages in the amount of Three Million Five Hundred Thousand Dollars ($3,500,000) for undue emotional and physical stress caused Walker by Seldman's woeful and fraudulent actions and (7) any such other and further relief that the Court may deem just and proper.

The case proceeded in a reasonably normal fashion of pre-trial pleadings including propounding Discovery Requests and Answers, and filing of Motions for Summary Judgment by Respondents wherein the trial court initially granted Seldman's Motion for Summary Judgment on grounds of Walker's alleged failure to Answer one Interrogatory sufficiently. Respondents claimed that Walker's response was an incomplete Answer. Walker sought reconsideration of the Order granting summary judgment and the Court vacated its Order and reinstated

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utilized the proceeds from the refinancing for his personal use and to cover certain debts/expenditures of the Company. The property's fair market value was around 1,000,000.00 in 2002 and is probably now worth in excess of $2,000,000 in keeping with the current real estate market in the District of Columbia.

Petitioner's case on *inter alia* the grounds that a genuine dispute of material fact existed over whether Walker should have been given the statutory right under §42-815.01 to cure his default prior to the foreclosure sale.

The case preceded to a pre-trial conference where the trial court issued an Order on November 18, 2001 calling for the submission of pre-trial memoranda on the following questions: 1. The duty of a substitute trustee on a deed of trust to investigate before foreclosure; 2. What is a "residential property" for purposes of the right of redemption after mortgage default including whether Plaintiff's residence can be defeated by his involuntary absence due to incarceration; 3. What are the elements of civil conspiracy; 4. The parties' election of remedies, and 5; If foreclosure is set aside, can Plaintiff also recover for damages for loss of use of property during the intervening period, and is Defendant Seldman entitled to an equitable set off for any improvements he made to the property.

The trial court ordered, pursuant to the Pre-Trial Order, that all briefs or memoranda on the issues outlined above were to be filed in the DC Superior Court on or before April 1, 2005. The lower court later extended that date to April 11, 2005, in light of the circumstances outlined below. Walker was represented by counsel at all times during these proceedings up until April 16, 2005. At the Pre-Trial conference, the trial court set a trial date for April 25, 2005.

The circumstances surrounding the case just prior to the trial date and at trial took on a convoluted and bizarre turn. On March 17, 2005, Walker's counsel was suspended from the

practice of law in the District of Columbia. See *In Re Edwards*, 870 A.2d 90 (DC 2005).[5] Ms. Edwards had represented Walker from the onset, including filing his action, filing a Memorandum of Law, pursuant to the Pre-Trial Order on April 11, 2005 and answering and propounding Discovery. Walker also notes here that he prosecuted his case with due diligence and never sought a continuance of any hearings, status conferences, pre-trial conferences and he filed all Memoranda required by the Court in a timely manner.[6] Prior to the trial set for April 25, 2005, Walker's counsel sought a stay of the effective date of her suspension on the grounds that she had numerous clients (over 300) and numerous litigated cases and it would be impossible to find substitute counsel for all of her clients in litigated matters

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Under the DC Disciplinary Rules (XI§14), the effective date of counsel's suspension from the practice of law was April 16, 2005 (30 days from the date of entry of the Order by the DC Court of Appeals). During this period, the Appellate Court permits suspended attorneys to complete existing case work, to notify clients of the suspension and to obtain substitute counsel where possible for clients in litigated matters.

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Seldman, et. al. filed a Motion to Dismiss on April 22, 2005, the Friday before the trial date using Walker's counsel's suspension as grounds. Respondents did not serve a copy of the Motion upon Walker (since his counsel was suspended). The court on April 25, 2005, granted Respondent's Motion to Dismiss without allowing the time for Walker to receive the Motion and at least respond within the time required by the DC Super Ct. R.12-I.

prior to their respective trial dates and that it would be impossible to notify all of her clients and wrap up her work for them in 30 days. Counsel listed Walker's case as one of the cases wherein she needed to continue her representation of Petitioner and the DC Bar counsel consented to allow Ms. Edwards the extension of the effective date of the suspension to represent Walker before the DC Superior Court. The Motion to Stay was filed by Walker's counsel in the DC Court of Appeals on March 28, 2005.

Walker was notified by his counsel of her suspension from the practice of law in early April of 2005 and he was also notified by Ms. Edwards that she had obtained substitute counsel to represent him, notwithstanding the pending Motion to stay the effective date of the suspension. Approximately two weeks before the trial was to take place, substitute counsel notified Walker's counsel that she would be unable to represent Petitioner at the trial due to unforseen circumstances. Counsel apprised Seldman, et. al.'s counsels of the situation and she apprised the trial court (through its Clerk) of the difficult position that she was in on behalf of her client, Petitioner.

Walker's by then former counsel (the Motion for Stay of the effective date of counsel's suspension was still pending) had obtained a second substitute counsel to represent Petitioner's case at trial. Shortly before the trial date on Friday, April 22, 2005; however, former counsel advised the court through its Clerk, that substitute counsel had a scheduling conflict in a previous matter and that Walker would probably move for a continuance under these circumstances. The Clerk of the Court

indicated to former counsel that the trial judge ordered her to also attend.

Walker and his former counsel attended the trial on April 25, 2005 and former counsel formally withdrew from the case in compliance with DC Bar Rule XI § 14. She also advised the trial court that she had obtained substitute counsel and he had accepted the case, but he had a scheduling conflict; he was in another court in a previous matter at the same time and could not attend. Former counsel indicated to the Court that substitute counsel asked her to seek a continuance on his behalf in light of the scheduling conflict and in light of the fact that he was just entering a case that had progressed substantially to the trial stage and he needed time to familiarize himself with case. Former counsel also advised the Court of her pending Motion to Stay the effective date of her suspension.

Petitioner also requested a continuance given his circumstance that he was suddenly without any counsel, through no fault of his own, the counsel who had successfully represented his interests since the initiation of his action in the DC Superior Court. Despite Walker's only request for a continuance throughout the duration of his case, the trial court denied his request and dismissed his case orally for want of prosecution and granted Seldman et. al.'s Motion to Dismiss. Petitioner suffered the severe sanction of dismissal of his case simply because he indicated that he needed counsel to handle the complex issues imposed by the trial court (the questions that the parties were required to answer in the pre-trial memoranda), and that he lacked the legal acuity to proceed as a pro se litigant in

his case, and that he was literally too intimidated to proceed without counsel. This was true particularly given his perception of the acrimonious nature of the Respondents and of the trial Judge throughout the proceedings.

On May 5, 2005, Walker's former counsel received a limited stay of the effective date of her suspension, in particular to represent Walker at trial. She immediately opposed the Motion to Dismiss and sought reconsideration of the trial court's oral Order in light of the stay. Walker on the day before his counsel received the stay, also filed a Motion for Reconsideration of the April 25, 2005 oral Order from the bench. The trial court denied the Motion for Reconsideration, despite the changed circumstances regarding Walker's counsel (she could now represent his interests at trial). Walker's Motion for Reconsideration was filed under SCR Civ 59(e).

Walker noted an appeal from the written Order denying Petitioner's Motion for Reconsideration and entered on July 26, 2005, to the DC Court of Appeals (No. 05-CV-1049) before the DC Court of Appeals granted Respondent's Motion for Summary Affirmance and entered an unpublished Memorandum Opinion and Judgment to this effect on December 21, 2005. The DC Court of Appeals subsequently denied Walker's Petition for Rehearing or Rehearing En Banc on February 14, 2006 and denied his Motion to Recall its Mandate on February 23, 2006.

During the pending appeal (No. 05-1049) before the DC Court of Appeals, Seldman filed a Motion to cancel the Notice of *Lis Pendens* against the property and he filed a Motion for Attorney's Fees and costs. The trial court delayed its ruling on

the Motion pending the disposition of the appeal until after the Order was summarily affirmed. Seldman subsequently petitioned the trial court to award him attorneys fees for his defense against Walker's appeal. On April 13, 2006, the trial court entered a final Order, granting Seldman's Motion for Cancellation and Release of Notice of *Lis Pendens* and for Attorney's Fees, as well as, his Supplemental Motion for additional attorneys fees and costs for defending against Walker's appeal. The trial court also amended its Order of April 25, 2006 and dismissed Walker's Verified Complaint with prejudice for want of prosecution under SCR. Civ. Rule 41(b).[7]

Walker noted an appeal from the trial courts' Order of April 13, 2006 (DCCA No. 06-CV-000479). Petitioner notes that the total award for attorneys fees and costs, including the costs to seek the removal of the notice of *Lis Pendens* was in excess of $95,000.00. Pursuant to Seldman's Motion for Summary Affirmance filed in appeal No. 06-CV-00479, the DC Court of Appeals entered on August 10, 2006, an unpublished Memorandum Opinion and Judgment summarily affirming the trial court's order of 4/13/06 and citing as applicable legal authority *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (DC 1988) and

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[7] Walker filed Responses to Seldman's Motion to vacate the notice of *Lis Pendens* and to be awarded attorneys fees incurred for Seldman's defenses in the trial court and the DC Court of Appeals. In the Responses, Walker asked for a hearing on the merits and the trial court denied this request.

D.C. Code §42-1207. On September 11, 2006, Walker filed a Petition for Rehearing or Rehearing *En Banc* in the Appellate Court and on November 3, 2006, the DC Court of Appeals denied the Petition in entirety. The DC Court of Appeals; however, stayed its mandate pending the filing of the instant Petition for Writ of Certiorari to this Court.

REASONS FOR GRANTING THE PETITION

I. Controversies over Real Property in the District of Columbia Constitute Controversies over Takings Strictly Regulated by the Due Process Provisions under the Fifth Amendment to the United States Constitution.

The founding fathers of the United States Constitution, ratified in 1789 intended that the seat of the Federal Government, which was derived by the transfer of certain sovereign powers of the States to it, should be at a neutral site and not within any existing State. As a result, the District of Columbia was created to serve as the seat of the Federal Government. The result is that the residents of the District of Columbia do not have full representation in Congress and Congress possesses over the District of Columbia the blended powers of a local and national legislature. *Shoemaker v. United States*, 147 U.S. 282, (1993); *O'Donoghue v. United States*, 289 U.S. 516 (1933).

The inhabitants of the District of Columbia, therefore, derive due process protections from the Fifth Amendment to the United States Constitution because the District is not a State *Bolling v. Sharpe*; 347 U.S. 497 (1954). The U.S. Supreme Court has written much case law in an effort to amend the U.S.

Constitution to equate the due process clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution, which strictly speaking applies only to the States. See for example, *Hepburn v. Ellzey,* 2 cr. (6U.S.)445 (1805); *Bolling v. Sharpe,* supra; *National Mutual Ins. Co. v. Tidewater Co.*, 337 U.S. 582 (1949) (DC Courts have diversity jurisdiction under Article III); *Wright v. Davidson*, 181 U.S. 371, 384 (1901); *Callan v. Wilson*, 127 U.S. 540 (1888) (All persons within the territory of the United States including the inhabitants of the District of Columbia are entitled to due process of laws); *Lovato v. New Mexico,* 242 U.S. 199, 201 (1916). There is; however, no equal protection of the laws clause in the Fifth Amendment to the U.S. Constitution.

The framers of the United States Constitution drafted a Bill of Rights to quell the fears of the citizens of the newly formed United States who were concerned that the Central Federal Government might by arbitrary decisions infringe upon their newly won freedoms. The Bill of Rights was adopted and ratified by the States in 1791 and its principles derived from the concepts written in documents such as the Magna Carta, the Declaration of Independence, and the Virginia Declaration of Rights. Inherent in these documents was the concept that the basis of government derives from its people and that the government may not infringe upon the privileges or freedoms of its citizens. It is also incorporated into the Bill of Rights from its predecessor the Magna Carta of 1215 A.D., the concept that citizens of the United States are entitled to protect their property rights (including real property) from encroachment by the government or by private citizens.

It became apparent to the legislatures and constitutional experts that the Federal Courts may have lacked the authority to enforce the provisions of the Bill of Rights against state laws and court decisions, since the states exclusively retained powers not transferred to the Federal Government. To resolve this problem, the Fourteenth Amendment was adopted and ratified in 1868 following the Civil War and Reconstruction and it was added to the Bill of Rights. The Fourteenth Amendment to the United States Constitution expressly guarantees the rights of citizens within the boundary of a state to due process of law regarding *inter alia* property and the guarantee that citizens within a state will have the equal protection of the laws, as well as the guarantee that Congress must enforce the provisions of the Fourteenth Amendment.

It is reasonable to argue that the words of the United States Constitution, strictly construed and used in their ordinary plain meaning provides with respect to *inter alia* property rights that citizens or residents of a state are entitled to the due process protections and are entitled to the equal protection of the laws which the courts must enforce. *Marbury v. Madison,* 5 U.S. 137, 174 (1803); *South Carolina v. United States*, 199 U.S. 437, 438 (1905); *Gibbons v. Ogden*, 22 U.S. 1 (1824). Therefore, Petitioner argues that residents of a state based upon the actual words of the Constitution are guaranteed through the Fourteenth Amendment's due process and equal protection clauses, protections from unfair governmental influence or taking of property even by corporations or private entities. (Substantive and procedural due process) without due process of law. It can

be reasoned here that in matters involving real property, the fundamental right to substantial justice in the courts is protected as to residents of states by the U.S. Constitution. This includes takings of property by the government or by private citizens, or entities (i.e. corporations, LLC's). Petitioner contends that controversies involving real property, which include controversies between citizens and takings for public use are all subject to the Equal Protection of the Laws Clause of the Fourteenth Amendment to the US Constitution.

Walker argues that the same situation does not exist for the residents of the District of Columbia, despite the Supreme Court's Legal Treaties interpreting the U.S. Constitution's due process clause of the Fifth Amendment to the United States to be essentially the same as that in the Fourteenth. *Bolling v. Sharpe,* supra; *United States v. Bitty,* 208 U.S. 393, 399-400 (1908). In fact, it is safe to argue here that the purpose underlying the creation of District of Columbia (to be a federal jurisdiction to seat the federal government directly controlled by Congress) automatically diminishes the full effect of an Amendment designed to protect states rights. The District is not a state, it is the seat of the Federal Government and Petitioner argues that real property belonging to the District's residents are in truth subject to more federal control than property owned by residents of states. Strictly construed, only the provisions of the Fifth Amendment apply to the District of Columbia. *Gibbons v. Ogden,* supra (words of the U.S. Constitution strictly construed); *Woodson v. Murdock,* 89 U.S. 351, 369 (1874); *State of Rhode Island v. The State of Massachusetts,* 37 U.S. 657 (1938); *Adams*

v. Clinton, 90 F. Supp. 2d 27 (D.DC. 2000).

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Walker argues that the unique situation of the territory of the District of Columbia (it is actually on federal land) and/or created for a federal purpose subjects all controversies regarding real property even those controversies involving private citizens to the Takings Clause of the Fifth Amendment. In other words, in the District of Columbia any controversy over real property is a controversy over a taking because the land in question is situated on lands expressly carved out from Virginia and Maryland to seat the Federal Government.

Walker argues that the even the unique situation in the District of Columbia regarding real estate values adds support to this contention. In the District within the last 5 years, real property values have escalated to the point where real estate such as in the instant controversy is easily valued in excess of $1,000,000.00. This fact coupled with the fact that real

property in the District is located on federal land subjects any controversy over real estate to the Takings Clause under the Fifth Amendment and calls upon the courts to enforce the heightened due process provisions under the Fifth Amendment to property protections which include advising a litigant to the right to counsel before proceeding. In essence, Walker argues that for purposes of the Fifth Amendment's Takings Clause, there should be no difference in controversies between private citizens, corporations, LLC's or other entities, or government organizations. All parties must be or should be represented by counsel in controversies involving real property in the District, unless an individual expressly seeks to waive that right. Petitioner submits that the same level of due process protections afforded to persons in criminal cases to the right to counsel ought to be afforded to persons in civil cases regarding real property rights, where such persons derived their rights from the Fifth Amendment to the U.S. Constitution.

The U.S. Supreme Court recently held in *Kelo v. City of New London,* 268 Conn 1, 843 A.2d 500 (affirmance) S.C. No 04-108 (2005) that state and local governments could seize privately owned land on behalf of private developers. In a dissenting opinion, Justice Sandra Day O'Connor argued that any property may now be taken for the benefit of another private party . . . but the beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. Justice O'Connor argued that the decision in *Kelo* (5-4) eliminates "any distinction between private and public use of

property and thereby deletes the words "for public use" from the Takings Clause of the Fifth Amendment. This case although it involves state government, is not inapposite Walker's argument that any controversy over real property in the District of Columbia is consistent with a controversy over a taking. The problem in the District is; however, that there is no equal protection of the laws clause under the Fifth Amendment which promotes even greater concern about real property controversies and the need for the DC Courts to make representation by counsel in such instances mandatory.

Currently, in such important matters as controversies over valuable real property, the DC Courts do not have to require, enforce or acquiesce to the right of a private citizen to legal counsel under the due process clause of the Fifth Amendment. Such a situation for the residents in a territory that is basically federal land and subject to the provisions of Fifth Amendment to the U.S. Constitution violates the very intent that the framing fathers had when they formed the Bill of Rights to protect *inter alia* U.S. citizen's property rights.

In the instant case, the trial court dismissed Walker's case involving the unlawful foreclosure on his real property for his alleged failure to prosecute under SCR Civ 41 (b). The actual facts dictate otherwise. In reality, the trial court attempted to coerce Walker into representing himself at trial telling him that the court had narrowed the case to one issue and that in its opinion, he could proceed in his proper person. The trial court ignored the fact that Walker and his former counsel stood before it and requested a continuance in light of his counsel's

sudden suspension from the practice of law (the only continuance ever requested by Petitioner). There was no sound reason for the lower court to take this drastic approach simply because the Respondents would have to come to court on another day. In short, the trial court and the DC Court of Appeals in summarily affirming the decision provided absolutely no constitutional safeguards for Walker and the DC Courts allowed what amounts an unlawful taking of Walker's real property by a larger interest[8] without due process of law.

It was ludicrous for a court to subject a litigant whose rights to a fair trial derived from the Fifth Amendment to the United States Constitution, to representing himself instead of granting a continuance so that he could have counsel prosecute his unlawful foreclosure action. Fundamental fairness and justice inherent in the procedural and substantive components of the Due Process Clause of the Fifth Amendment with respect to real property takings or otherwise in the District of Columbia dictate a different result.

II. Controversies over Real Property Should Require the Courts in the District of Columbia to Enforce an Absolute Right to Counsel under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

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[8] Seldman was not only the managing member of SELKER, LLC, he is the founder of the Institute for Local Self Reliance ("ILSR") which is a state wide organization. Seldman routinely used funds from SELKER to fund projects in the ILSR including as mentioned earlier, funds from re-financing Walker's real property after the foreclosure.

The arguments outlined in Section I of this Petition for a Writ of Certiorari are referenced and incorporated herein. Walker has argued that controversies over real property in the District of Columbia automatically involve a controversy over takings under the Fifth Amendment to the U.S. Constitution and that such controversies should require heightened due process protections by the Courts including the absolute right to be represented by counsel. Petitioner reiterates that because the District of Columbia is not a state, it is subjected to the due process clause of the Fifth Amendment and strictly construed the Fifth Amendment contains no equal protection of the laws clause, so the Courts should be required to guarantee the absolute right to representation by counsel in civil matters involving real property. Courts created under Article III of the U.S. Constitution in territories that are not states should not attempt to force litigants in such instances to represent themselves, in proper person.

The Fifth Amendment is a restraint on the legislative and on the executive and judicial powers of the government. All persons, especially inhabitants of the District of Columbia within the territory of the United States are entitled to its protection, including incorporations, aliens and citizens seeking readmission to the United States. *Wright v. Davidson* supra; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). Due process of law or the "law of the land" under the Fifth Amendment must not only entitle or enforce precise safeguards of accused persons to

counsel, it must also entitle the same safeguards to persons in controversies over property. (i.e. just compensation upon taking of private property for public use or the taking of private property by private entities). *Kelo v. City of New London,* supra.

It flows from this reasoning that due process of law under the Fifth Amendment with its broad inclusions against actions of the federal government regarding individual persons accused of crimes, against self incrimination in a criminal and/or civil proceeding, against custodial interrogation and against takings of property must include the compulsory clause to the right to have the assistance of counsel similar to that right under the Sixth Amendment to the United States Constitution. Petitioner argues that framers of the Constitution and the Bill of Rights did not intend for the courts of the land to deny to its citizens the right to counsel simply because they were proceeding in a civil matter. The language of the Fifth Amendment certainly did not intend this result. Walker maintains that the clause in the Fifth Amendment which states: nor [shall any person] be deprived of life, liberty, or *property*, without due process of law" guarantees that the Court's enforce the right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Petitioner maintains that in the District of Columbia where property rights are concerned and where Walker contends that any controversy over real property is a controversy over a taking, any court that fails to bend over backwards to make sure that a party bringing an action is represented by counsel and then goes on to rule adversely against that party has rendered an arbitrary and capricious or unreasonable ruling. There is no

doubt that any court that deliberately prevents a party from seeking counsel simply for the convenience of the other parties (as was this situation in the instant case) where his real estate is involved (or for any issue), has rendered an arbitrary and capricious ruling.

Walker maintains that the DC Appellate Court can shelter its unlawful rulings of this type that are actually abuses of the lower court's discretion by applying loosely the Rules of Civil Proceedings. That is, the trial court can state, for example, *this is a last minute request for a continuance to get counsel and I don't care that you encountered extraordinary circumstance. The opposing side is ready to go to trial and you can either represent yourself against this team of lawyers or I will rule that you failed to prosecute. Be aware; however, that if you elect to proceed on this very narrow issue regarding your real property that any pro se litigant ought to able to prosecute, anything you say can and will be used against you.* This is exactly the scenario presented to Petitioner at trial on April 25, 2005.

The trial court succeeded in intimidating Walker so that he would not attempt to litigate the case himself[9] so that it could

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[9] Walker, when faced with this decision, asked if he could speak to his former counsel to get the documents in her possession that could help him present his case. The Court stated that he could not do this because a suspended attorney would be advising him. The Court prevented former counsel from even assisting him to plead his case as a friend, by providing the documents that were in her possession. *United*

enter a ruling of failure to prosecute under DC SCR Civ. R. 41(b). Walker must reiterate here that he had never sought a continuance in any prior trial proceeding. The DC Court of Appeals then in turn entered rulings summarily affirming (in an unpublished opinion that has no legal precedent) the trial court's decisions. Entering an Order granting summary affirmance permits the Court to eliminate important issues or satisfy a special interest non-meritoriously or give undeserving parties a win or a favorable decision that cannot really be sufficiently challenged in a higher appellate court. It permits a court to exact a decision that goes against legal precedent (i.e. no property owner's residence can be taken through foreclosure without a right to reinstate a residential loan) and since it is unpublished, it cannot be adequately challenged on appeal.

The right to own and protect one's real property is a valuable one protected by the U.S. Constitution. The language of the Constitution provides guarantees against a taking of property by government and by private citizens and whether it is taken by the government or lost to special interests, the result is the same, the property is lost to the individual. Property rights whether it be over one's person, real estate (particularly where values exceed $250,000) or over one's valuable personal property must be enforced by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Residents of the District of Columbia do not have the equal protection of the laws clause provided to the residents

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Mine Workers v. Illinois Bar Assoc. 389 U.S. 217(1967)

of a state and they are strictly subject to the provisions of the Fifth Amendment to the U.S. Constitution. This Article not only has no component regarding equal protection of the laws, it has no statement that Congress shall have power to enforce for example the due process clauses (although this probably axiomatic).

Petitioner is arguing here that because of the unique issues in the matters involving real property in the District of Columbia, the Fifth Amendment should be read to mean that every component of the Amendment whether it involves criminal proceedings or real property proceedings should have the same force with respect to the right to counsel. In other words, if a civil litigant is standing before the Court in a controversy over real property or a taking of real property, the heightened safeguards to representation by counsel should be employed just as it is in a criminal matter where the accused enjoys the privileges of the Fifth and Sixth Amendment. ("the accused shall enjoy the right to have assistance of counsel). Alternatively, persons litigating in matters involving real property in the District of Columbia where as Petitioner argues, corporations, entities and individual inhabitants are the same since any controversy is a controversy over a taking, should be prohibited by the courts from undertaking litigation without counsel. This would be a measure of equal protection of the laws enjoyed by the states with respect to real estate.

Walker argues here as he has previously, that the DC Courts enjoyed too much leeway in his civil matter and the result was disastrous. He lost a property valued over

$2,000,000.00; he lost all of his business assets and $95,000.00 in legal fees and costs derived from litigation in the lower court and the DC Court of Appeals were added to his debt. This was compounded by the fact that he lost the real property while he was incarcerated and had no freedom to move about. Petitioner notes here that he would have succeeded on the merits of his case had he been represented by counsel in that Seldman's actions were prohibited by DC Statue. Instead, Petitioner received a non-meritorious adverse decision because of the trial court's chicanery and he was subjected to the DC Court of Appeals' non-meritorious resolution of the matter by summary affirmance.

Walker was denied due process and the equal protection of the laws and he believes that the DC Courts were not obligated enough to enforce a clause (equal protection) that was not expressly written under the Fifth Amendment to the U.S. Constitution. There must be more protection afforded to DC residents regarding their valuable real estate from unscrupulous interests. There should be no court(s) standing as an impartial body that would deny to a resident the right to counsel in matters involving his real property. Certiorari upon the DC Court of Appeals should be granted based upon the issues and arguments raised in Sections I and II under Reasons for Granting this Petition.

III. The Fifth Amendment to the United States Constitution which does not contain the Equal Protection of the Laws Clause, but which Governs the Territories that are not States is not a Valid exercise of Congress' Power to Enforce Due Process Rights of such Residents in Civil Issues.

To give validity to the history of the construction of the U.S. Constitution, it must be stated that with respect to the District of Columbia, the framers when the Constitution was drafted and ratified by the states sought, as presented earlier, to separate the seat of government from the states. Therefore, a separate territory was carved out only for the purposes of housing the central government of the United States so that it could carry out its business of the welfare of the whole nation free from the control of any State.[10]

Thus, there was not given much recorded consideration initially to the inhabitants of the land where the newly formed government was now situated in terms of a Bill of Rights. James Madison in the Federalist, No.43 (J Cooke, ed 1961), 289 stated the following:

> [the inhabitants] "Will have their voice in the election of the government which is to exercise authority over them, as a municipal legislative for all local purposes derived from their own suffrages, will of course be allowed them . . ."

Other scholars and political figures of the times wrote similar

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The formation of the District of Columbia to seat the Federal Government grew out of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, and physically threatened and verbally abused members of Congress and caused them to flee the city when neither municipal nor state authorities would take action to protect the members. W. TINDALL, TITLE ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA (Washington, 1903), 31-36.

treatises about the rights of District residents.

The result was that U.S. Constitution strictly construed, provided and still provides today only the protections of the due process clause of the Fifth Amendment to the U.S. Constitution. It is not a state and it was never intended to be a state (*Adams v. Clinton,* supra), nonetheless, its residents are residents and citizens of the United States and Walker argues here that residents of the District of Columbia (and residents of the territories controlled by the United States) are entitled to the same protections of their rights to life, liberty and property that the states enjoy under the concept of States Rights. In other words, although the District of Columbia's inhabitants are under the direct control of the Federal Government they should also be afforded the same inalienable rights and property rights from government encroachment that citizens of states enjoy.

The truth is that even though the Supreme Court has interpreted the Equal Protection of the Laws Clause of the Fourteenth Amendment to also provide equal protection of the laws under the Fifth Amendment, the words of the Amendment do not state it. *Bolling v. Sharpe,* supra. In our system of jurisprudence, the words of a statute or law are accorded its strict, everyday or ordinary common meaning. *Wright v. U.S.,* supra; *South Carolina v. United States*, supra. Therefore, enjoyment of a law is limited to what is written in that law. The inclusion of the equal protection of the laws clause is what gives Congress and the courts the right to enforce the rights of the people against due process violations. Congress cannot enforce the law unless it is stated therein.

Residents in the District of Columbia do not have adequate protections against, for example, takings of their real property by special interests and or by developers. DC is not a state and it was never intended to be a state when the framers of the Constitution claimed the territory because it is the seat of United States Government. This was not the purpose of its creation. Nonetheless, there should be no bar to its residents receiving the full and equal protections of the laws that apply to them (The Fifth Amendment).

Due process, particularly in civil matters to persons whose rights derive from the Fifth Amendment cannot be adequately enforced without the inclusion of an equal protection of the laws clause in the Amendment. The Courts are now free to make arbitrary decisions like the decision made in the instant case and at least a greater measure of protection regarding property rights (and other rights) would be afforded to the District's residents if language regarding equal protection of the laws are included in the Fifth Amendment.

Even though Congress permitted a form of self-government to the District in 1970, this does not overcome the fact that the due process clause under the Fifth Amendment contains no equal protection of the laws clause and the highest Court has maintained that these clauses (Equal Protection and Due Process) are not the same. Petitioner believes that the lack of adequate protection of the rights of DC residents regarding real property helped to aide the escalation on real estate and over speculation and the unlawful taking of property by developers and investors. Walker also maintains that the symbiotic relationship between the private interests and the

DC Government have helped accomplish this effect. These "takings" are not regulated by the DC Government; the Government benefits from the housing situation and the DC Courts are in many instances permitting developers, etc. to take private citizen's property without assuring or affording heightened due process protections for the homeowners.

Petitioner maintains that the unique situation in the District in that its residents are afforded only the protections under the Fifth Amendment (no Equal Protection of the Laws Clause) permits the DC judiciary to play fast and loose with a homeowner's rights resulting in the exact scenario that occurred in the instant case.

CONCLUSION

In light of the arguments presented in this Petition for a Writ of Certiorari, Petitioner prays that this Court grant the Petition.

Respectfully submitted,

Le Bon Bruce Walker, pro se
203 Seaton Place, NE
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(202) 491-2940

DATED: February 1, 2007

APPENDIX OF ORDERS
AND EXHIBITS

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 06-CV-479 **FILED NOVEMBER 16, 2006**

LE BON BRUCE WALKER
Appellant,

v. CAB3882-03

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge, Farrell, Associate Judge, and Terry, Senior Judge

O R D E R

On consideration of appellant's unopposed motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari, and it appearing that the mandate was due to issue on November 10, 2006, it is

ORDERED that the motion is granted and the Clerk is directed to stay issuance of the mandate through February 8, 2007. Appellant is directed to advise this court in writing upon the filing of his petition in the Supreme Court of the United States. D.C. App. R. 41(d)(2)(B).

PER CURIAM

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Clerk, Superior Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 06-CV-479 **FILED NOVEMBER 3, 2006**

LE BON BRUCE WALKER
Appellant,
v. CAB3882-03

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge; Farrell, Ruiz, Reid, Glickman, Kramer and Fisher and Blackburne-Rigsby, and Thompson, Associate Judges; *Terry, Senior Judge

O R D E R

On consideration of appellant's *pro se* petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 06-CV-479 **FILED AUGUST 10, 2006**

LE BON BRUCE WALKER
Appellant,
v. CAB3882-03
NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge Farrell, Associate Judges, and Terry, Senior Judge.

J U D G M E N T

On consideration of appellees' motion for summary judgment and the opposition thereto, it is

ORDERED that the motion for summary affirmance is granted. It is

FURTHER ORDERED AND ADJUDGED that the order on appeal is hereby affirmed. *See Kudon v f.m.e.*, Corp., 547 A2d 976 (D.C. 1988) and D.C. Code § 42-1207 (d) (2001).

ENTERED BY THE DIRECTION OF THE COURT
/s/
GARLAND PINKSTON, JR.
Clerk of the Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1049 **FILED FEBRUARY 14, 2006**

LE BON BRUCE WALKER
Appellant, CAB3882-03

v.

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge *Schwelb , Farrell, Ruiz, **Reid, *Glickman, Kramer and Fisher, Associate Judges, *Nebeker, Senior Judge.

O R D E R

On consideration of appellant's *pro se* motion for reconsideration, of judgment order granting summary affirmance and denying summary reversal, construed as a petition for rehearing or rehearing en banc, it is

ORDERED that appellant's motion for summary reversal is denied. It is

ORDERED by that the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

** Judge Reid has recused herself from this case.

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1049

FILED DECEMBER 21, 2005

LE BON BRUCE WALKER
Appellant, CAB3882-03

v.

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Schwelb and Glickman, Associate Judges, and Nebeker, Senior Judge.

JUDGMENT

On consideration of appellees' motion for summary affirmance, appellant's opposition and cross-motion for summary reversal and appellee's reply, it is

ORDERED that appellant's motion for summary reversal is denied. It is

FURTHER ORDERED that appellees' motion for summary affirmance is granted. *See Jones v. Cain,* 804 A.2d 322, 330 (DC 2002). It is

FURTHER ORDERED AND ADJUDGED that the order on appeal is hereby affirmed.

ENTERED BY THE DIRECTION OF THE COURT
/s/
GARLAND PINKSTON, JR.
Clerk of the Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1049 **FILED APRIL 6, 2006**

LE BON BRUCE WALKER Appellant, CAB3882-03
v.
NEIL SELDMAN, et.al. Appellees.

BEFORE: Schwelb and Glickman, Associate Judges, and Nebeker, Senior Judge.

ORDER

On consideration of the motion of *pro se* appellant to recall mandate, and the opposition thereto, it is

ORDERED that the motion is denied.

PER CURIAM

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LE BON BRUCE WALKER Plaintiff,	:	
	:	Civil Action No. 03-3882
v.	:	Calendar 14
NEIL SELDMAN, et. al., Defendants.	:	

ORDER

This matter is again before the court on Defendant Seldman's motion for cancellation and release of the notice of lis pendens and his motion for a judgment awarding attorneys' fees and costs. On April 25, 2005, the court dismissed Plaintiff's action pursuant to Super. Ct. Civ. R. 41(b). The order was docketed on April 27, 2005. Defendant Seldman timely filed his motions on May 11, 2005. On July 25, 2005 (docketed July 26, 2005), the court denied Plaintiff's motion for reconsideration of the April 25, 2005 order of dismissal. Plaintiff appealed that order, and Defendants noted a cross-appeal. In its July 25, 2005 order, the court deferred ruling on Defendant's instant motions pending the outcome

of any appeals. On December 21, 2005, the Court of Appeals summarily affirmed this court's denial of Plaintiff's motion for reconsideration of the order of dismissal, and on February 14, 2006, the Court of Appeals denied Plaintiff's petition for rehearing and rehearing en banc. On February 15, 2006, the Court of Appeals dismissed Defendants' cross-appeal as moot. On February 24, 2006, Defendant Seldman filed a supplement to his motion to include the additional attorneys' fees and costs incurred defending Plaintiff's appeal. On March 15, 2006, Plaintiff filed in the Court of Appeals a motion to recall the mandate. The Court of Appeals denied that motion in an order entered April 6, 2006. Defendant Seldman's motions are therefore finally ripe for decision.

Defendant's motion for cancellation and release of the notice of lis pendens will be granted. Pursuant to D. C. Code § 42-1207(d), Defendant Seldman now has a final judgment of dismissal and he is entitled to an order canceling and releasing the notice of lis pendens.

Defendant Seldman is also entitled to an award of attorneys' fees and costs. Plaintiff defaulted on his mortgage. Defendant Seldman foreclosed. Plaintiff filed this action seeking to set aside the foreclosure alleging, *inter alia*,

wrongful foreclosure, conspiracy to commit fraud and unjust enrichment. Plaintiff's Deed of Trust provided, in pertinent part:

> In the event that Grantor breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note.

Plaintiff, to say the least, "does not prevail in that litigation." He narrowly escaped summary judgment and then elected not to proceed on the day of trial. There has now been entered a final judgment of dismissal, and Plaintiff has exhausted all rights of appeal.[1] The provision for attorneys' fees in the Deed of Trust is clear and unambiguous. The only question for the court is whether the fees requested are "reasonable."

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[1] It is both wrong and disingenuous for Plaintiff to argue that the dismissal of this action was not a judgment on the merits. Pursuant to Super. Ct. Civ. R. 41(b), the dismissal is an adjudication on the merits. Moreover, Plaintiff's election not to proceed to trial on April 25, 2005 deprived Defendants of their opportunity to demonstrate once and for all the Plaintiff's challenge to the foreclosure was without merit.

Concord Enterprises Inc. v. Binder, 710 A.2d 219, 225 (DC 1998). The court has carefully scrutinized Defendant's statement of fees submitted by his counsel. The amount, while large is fully justified by the nature of the litigation. The hours spent by counsel were reasonably necessary to defend the action brought by Plaintiff, and the hourly rates charged by the attorneys were certainly commercially reasonable considering the competence and experience of the attorneys involved.[12]

As the prevailing party, Defendant Seldman is entitled to an award of costs pursuant to Super. Ct. Civ. R 54(d). This covers filing fees and other ordinary court costs. Extraordinary costs are recoverable under Rule 54-I. This certainly includes deposition transcripts, records' search and fees for copying, and other expenses for materials to be used at trial or necessary for the preparation of an adequate defense. Defendant Seldman also seeks costs for Westlaw

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[2] At least some of the attorneys' fees charged were attributable to the rather haphazard way in which Plaintiff chose to litigate his action. Even a cursory review of the motions and orders in the court file demonstrates Plaintiff's numerous defaults in his discovery obligations and failure to prosecute his case with reasonable diligence.

research, long distance calls, travel to court, parking and the like. Whether or not the court would exercise its discretion to award these amounts pursuant to Rule 54-I, they are plainly reasonable under the circumstances of this case and recoverable as a matter of contract under Paragraph 10 of the Deed of Trust.

For the foregoing reasons, it is this 13th day of April, 2006,

ORDERED that judgment shall be entered in favor of Defendants dismissing the complaint with prejudice; and it is further

ORDERED that, pursuant to D. C. Code § 42-1207(d), the judgment shall expressly provide that the notice of lis pendens recorded in the Land Records of the District of Columbia Recorder as instrument no. 58964 on May 14, 2003, is cancelled and released, and it is further

ORDERED that the judgement for Defendant Seldman shall include the award of attorneys' fees in the amount of $91,702.50 and costs in the amount of $3,367.05, plus the cost of canceling and releasing the notice of lis pendens, plus interest on these amounts at the statutory rate from the date of judgment.

/s/

JUDGE FREDERICK H. WEISBERG

Order docketed 4/13/06
and copies mailed from
chambers, First Class Mail
to parties indicated above
on 4/14/06

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LE BON BRUCE WALKER	:	
Plaintiff,	:	
v.	:	Civil Action No. 03-3882
	:	Calendar 14
NEIL SELDMAN, et. al.,	:	
Defendants.	:	
	:	

ORDER

This matter is before the court in an unusual procedural posture. On April 25, 2005, the court dismissed this action for want of prosecution. Two days later, on April 27, 2005, Plaintiff filed a notice of appeal from that ruling. Thereafter, on May 4, 2005, Plaintiff filed with this court a motion for reconsideration of the April 25th order, in the nature of a motion pursuant to Super. Ct. Civ. R. 59(e). Ordinarily, absent a remand, the filing of Plaintiff's notice of appeal would deprive the trial court of jurisdiction to grant (but not to deny) Plaintiff's motion. Smith v. Pollin, 90 U. S. App. D.C. 178, 179; 194 F.2d 249, 250 (1952). However, on July 19, 2005, the District of Columbia Court of Appeals entered an order dismissing the appeal as premature because of the

pendency of Plaintiff's Rule 59(e) motion in the trial court. Accordingly, Plaintiff's motion is now before the court on the merits. The matter is also before the court on Defendant Neil Seldman's motions to release the *lis pendens* and his motion for attorneys' fees and costs.[1]

Plaintiff has presented nothing in his motion for reconsideration that was not before the court on April 25, 2005. The decision to dismiss this action after denying Plaintiff's untimely request for a continuance was not one the court took lightly. The court made its decision only after hearing at length from Plaintiff and Ms. Edwards, who at that time was under suspension and could appear only as a fact witness, as well as counsel for Defendants. However, in light of certain representations in Plaintiff's pleadings, the court will address some of the points Plaintiff has raised.

First, Plaintiff asserts in footnote one of his reply to Defendants' opposition to his Rule 59 motion and again on page five of the same pleading that the court's law clerk told Ms. Edwards on April 22, 2005, that, given her inability to

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[1]Plaintiff opposed both of Defendant Seldman's motions and also filed on May 11, 2005, a belated written opposition to Defendants' motion to dismiss, which Defendants filed before the trial date of April 25, 2005.

produce a substitute lawyer for the Plaintiff, the court would in all likelihood grant a continuance on the morning of trial, the following Monday. This is emphatically not true. By April 22, 2005, the court had already received Defendants' written motion to dismiss. It would not have allowed its clerk to offer any opinion on the likely outcome on the morning of trial, especially with such a motion pending, and the law clerk has assured the court he said no such thing. At most, the clerk would have conveyed to Ms. Edwards what the court told its clerk to convey, which was to tell Ms. Edwards to appear on Monday to explain the circumstances and be available to Plaintiff as a witness should he seek a continuance.

Second, the court learned of Ms. Edwards' suspension at about the same time as Defendants, by reading the slip opinion from the Court of Appeals. Ms. Edwards did not contact the court in March or early April to request a continuance or to suggest any other problem adhering to the April 25th trial date, even though all parties knew that the suspension was then scheduled to take effect on April 18, 2005. During this time, Defendants' counsel represented to the court's staff members that he had made numerous attempts to contact Ms. Edwards, to no avail, to determine

whether Plaintiff would be ready to proceed to trial on April 25, 2005. When Ms. Edwards finally contacted the court in response to an inquiry about the status of the April 25th trial date, Ms. Edwards emphatically stated that Plaintiff was not seeking a continuance, he would appear ready for trial on April 25th, and would be represented either by Ms. Edwards (with dispensation from the Court of Appeals) or by substitute counsel who was prepared to take the matter to trial. Based on those representations, the court advised counsel for Defendants to prepare for trial and directed both sides to file their trial briefs, the deadline for which had previously been extended. If Ms. Edwards had requested a continuance in early April, the court might have been willing to grant a brief continuance of the trial date, even over the objection of the Defendants. Instead, it was not until April 22, 2005, the Friday before trial, that Ms. Edwards first advised the court that Plaintiff would not be represented for trial on Monday.[2]

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[2]Plaintiff argues that it is not his fault, and not Ms. Edwards' fault, that the substitute counsel Ms. Edwards had lined up backed out at the last minute, and the substitute for the substitute had a scheduling conflict. Without getting into the middle of Ms. Edwards' negotiations with substitute counsel, the court can appreciate the reluctance of new counsel to make a commitment while at the same time Ms.

When Monday came, Plaintiff appeared with Ms. Edwards and without counsel and requested a continuance. Defendants objected and pressed for a ruling on their previously filed motion to dismiss. After hearing at length from all parties, the court denied the request for a continuance. It was not a step the court took lightly. The court fully understood that if the matter proceeded to trial and resulted in a verdict for the Defendants, a reviewing court would have to decide whether the court had properly exercised its discretion.[3]

Edwards was attempting to secure a reprieve from the Court of Appeals. In any event, whether or not it was Plaintiff's fault or Ms. Edwards' fault for Plaintiff's appearance without counsel, it was certainly not Defendants' fault.

[3]In exercising its discretion, the court considered the complexity of the case. Plaintiff characterizes the case as complex, but it had actually devolved into a relatively straightforward matter. While Plaintiff undoubtedly preferred to be represented by counsel, as a result of earlier rulings sanctioning Plaintiff for his earlier procedural defaults or those of his counsel, Plaintiff's witnesses were limited to himself and opposing parties, the case was to be tried without a jury, and the entire case turned on a single disputed factual issue: was the property in question Plaintiff's personal residence for purposes of his statutory right of redemption after he defaulted on his mortgage. Before ordering Plaintiff to proceed on the morning of trial, the court made a judgment that Plaintiff was fully capable of presenting his case in its

The court did not dismiss Plaintiff's case as a sanction, and the decisions addressing that issue are inapposite. Instead, the court denied Plaintiff's last minute motion for a continuance and directed him to proceed without counsel. Plaintiff had a choice, which the court carefully explained to him. He could proceed over his objection, and preserve the issue for appeal. If he prevailed at trial the issue would be moot. If he lost, he could argue on appeal that the court should not have required him to proceed without counsel. Or he could do what he did, which was to elect not to proceed. When Plaintiff announced that he was not prepared to proceed to trial, the court granted Defendants' motion to dismiss for failure to prosecute pursuant to Super. Ct. Civ. R. 41(b).

The Court of Appeals will now have to review the record without knowing what the outcome at trial would have been. Nonetheless, the record is clear. Plaintiff had an opportunity to seek a continuance of the trial based on his lawyer's unfortunate predicament, but chose not to. Plaintiff's counsel could have withdrawn and assisted Plaintiff in fully engaging new counsel in time to try this relatively uncomplicated case, but chose not to. On this record, the court fails to see any

---

pared-down procedural posture.

grounds on which to reconsider and reverse the rulings made on April 25, 2005, after careful consideration.

The matter is also before the court on Defendant Seldman's motion for an order releasing the *lis pendens* and his motion for attorneys' fees and costs. The court's dismissal for want of prosecution on April 25, 2005, was an adjudication on the merits. The judgment of dismissal was not docketed until April 27, 2005, and therefore Defendant Seldman's motion for attorneys' fees was timely filed on May 11, 2005, pursuant to Super. Ct. Civ. R. 54(d)(2)(B). Defendant is the prevailing party and, as such, is entitled to costs under Rule 54 and to attorneys' fees pursuant to the Deed of Trust that was foreclosed. The court is not unmindful of the prejudice to Defendant Seldman created by the *lis pendens* and of the financial burden of having to advance his attorneys' fees to defend against Plaintiff's action to set aside the foreclosure. However, it is apparent the Plaintiff intends to appeal this court's judgment of dismissal. Until he does, and the Court of Appeals decides the issue, it cannot be determined with finality that Defendant is the prevailing party. If the court should cancel the lis pendens prematurely, it would permit Defendant Seldman to dispose of the property and frustrate Plaintiff's ability to obtain full relief should he ultimately

prevail. The court is confident that it exercised its discretion in this matter fairly and properly, but Plaintiff has a right to have that question reviewed on appeal. Until then, the court will defer ruling on Defendant Seldman's motion to cancel the *lis pendens* and his motion for costs and attorneys fees. See Breiner v. Daka, Inc., 806 A.2d 180, 183 (D.C. 2002).

Accordingly, it is this 25th day of July, 2005,

ORDERED that Plaintiff's motion for reconsideration be, and it hereby is, denied, and it is

further,

ORDERED that the court will defer ruling on Defendant Seldman's motion for attorneys' fees and costs and his motion for cancellation and release of notice of *lis pendens* until the time for noting an appeal from this order has expired or until the disposition of any appeal that may be taken.

/s/
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No. 06-1615

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LeBON BRUCE WALKER,

Petitioner,

v.

NEIL SELDMAN, ELIZABETH MENIST
and DIANNE STEWART,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS ELIZABETH MENIST AND DIANNE STEWART

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Respondents Elizabeth Menist and Dianne Stewart, by counsel, respectfully submit that LeBon Bruce Walker's ("Walker") Petition for Writ of Certiorari should be denied, and the Court should decline to review this case.

OPINIONS BELOW

The April 13, 2006 Opinion and Order of the District of Columbia Superior Court, and the August 10, 2006 and November 3, 2006 Orders of the District of Columbia Court of Appeals are set forth in the Appendix attached to the Petition for Writ of Certiorari ("Pet. App."). It should be noted that Walker does *not* seek review of the following opinions: July 25, 2005 Order of the Superior Court of the District of Columbia; December 21, 2005 Order of the District Court of Appeals granting summary affirmance and denying Walker's petition for rehearing en banc; February 14, 2006 Order denying Walker's motion for reconsideration; April 6, 2006 Order denying Walker's motion to recall mandate (also set forth in Petitioner's Appendix).

JURISDICTION

This Court has jurisdiction to review (or decline to review) the decision of the District of Columbia Court of Appeals, No. 06-CV-479, denying Walker's petition for rehearing related to the Superior Court's Order granting Seldman's motion for cancellation and release of the notice of *lis pendes* and awarding Seldman attorneys' fees and costs. However, this Court has no jurisdiction to review the April 6, 2006 Order of the District Court of Appeals, No. 06-CV-1049, denying Walker's motion to recall the Mandate related to the trial court's dismissal of Walker's case for failure to prosecute and denial of his motion for continuance as to

respondents Menist and Stewart. Walker failed to timely file a Petition for Writ of Certiorari from that final order related to those issues.

INTRODUCTION

Walker did not timely file a petition for writ of certiorari with regard to certain issues in his appeal, and they should not be considered. Moreover, Walker has not presented "compelling reasons" for his Petition to be granted. *See* Sup. Ct. R. 10. Specifically, Walker fails to demonstrate that the decision of the District of Columbia Court of Appeals is in conflict with another United States court of appeals or with a decision by a state court of last resort, or that the D.C. Court of Appeals has decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Walker's Petition attempts to fashion a constitutional argument where none exists, and it should therefore be denied.

STATEMENT OF THE CASE

This case arises out of Walker's default on his promissory note to respondent Neil Seldman ("Seldman") securing a second mortgage on property in Washington, D.C. Respondents Elizabeth Menist ("Menist") and Dianne Stewart ("Stewart"), both attorneys, acted as substitute trustees for the Deed of Trust securing the note.

In January 2000, Seldman loaned $174,000 to Walker, who executed a Promissory Note and Deed of Trust, securing the loan with property he owned at 1922 3rd Street, N.W., Washington, D.C. After Walker was incarcerated some time in 2001, he defaulted on the loan. With proper notice to

Walker, Seldman foreclosed on the secured property through the substitute trustees, Menist and Stewart. Walker contended that the foreclosure was "illegal" since he was not afforded his right to cure the default pursuant to D.C. statutory law (Pet. at p. 5).

Walker initially filed a Complaint on May 12, 2003 in the Superior Court of the District of Columbia, Civil Action No. 03-3882, in an action entitled *LeBon Bruce Walker v. Neil Seldman, Barry Mitchell, Bruce Mitchell, Elizabeth Menist, Dianne Stewart, and Carole McIntyre*. The Superior Court complaint alleged wrongful foreclosure, breach of contract, fraud and sought compensatory and punitive damages. Trial was scheduled for April 25, 2005 on the *sole* issue: "was the property in question Plaintiff's [Walker's] personal residence for purposes of his statutory right of redemption after he defaulted on his mortgage" (Pet. App at 22a, n. 3). Seldman, Menist and Stewart moved to dismiss the case in its entirety on grounds that Walker could not state a claim, and for his failure to prosecute the case. On the day of trial, Walker sought a continuance, as his attorney was suspended from the practice of law and he had not retained substitute counsel. The court denied Walker's motion for a continuance and gave Walker a choice: proceed without counsel over objection, thus preserving the issue of whether he should have been entitled to counsel, or elect not to proceed. Walker elected not to proceed with the trial, and the court granted Seldman, Menist and Stewart's motion to dismiss for failure to prosecute (Pet. App. at 18a – 25a).

On May 4, 2005, Walker moved for reconsideration of the dismissal order. A week later, on May 11, 2005, Seldman filed a motion for cancellation and release of notice of *lis pendes* and for attorneys' fees and costs. By Order dated

July 25, 2007, the court denied Walker's motion for reconsideration, and deferred ruling on Seldman's motion for cancellation and release of the notice of *lis pendes* and for fees and costs until the time for appeal expired (Pet. App. at 18a – 25a).

Walker filed an appeal in the District of Columbia Court of Appeals, No. 06-CV-1049, challenging the Superior Court's discretion in denying his oral motion for continuance and dismissing his case for want of prosecution when he chose not to proceed with the trial ("First Appeal"). On December 21, 2005, the Court of Appeals granted summary affirmance of the Superior Court's ruling and denied Walker's motion for summary reversal and his petition for rehearing *en banc* (Pet. App. at 9a-10a). Walker's motion for reconsideration of the December 21, 2005 order was denied on February 14, 2006 (Pet. App. at 7a-8a). The Court of Appeals issued its Mandate on February 23, 2006, and denied Walker's motion to recall the mandate on April 6, 2006 (Pet. App. at 11a).[1]

Once the Mandate was affirmed, the Superior Court granted Seldman's motion for cancellation and release of the notice of *lis pendes* and for fees and costs by its Order dated April 13, 2006 (Pet. App. at 12a-17a). Walker then filed another appeal in the District of Columbia Court of Appeals, No. 06-CV-479, related to the Order to release the notice of *lis pendes* and the award of attorneys' fees and costs ("Second Appeal"). Respondents Menist and Stewart were not parties

1. On March 31, 2006, Walker filed an identical action against Seldman, Menist and Stewart in the U.S. District Court for the District of Columbia Case No.: 1:06CV00603. Defendants' motions to dismiss were granted, and Walker has appealed this decision as well. *See Walker v. Seldman*, 471 F.Supp.2d 106 (D.C. Cir. 2007).

to the Second Appeal. On August 10, 2006 the D.C. Court of Appeals issued a Judgment Order granting Seldman's motion for summary affirmance (Pet. App. at 5a-6a). Walker then filed a Petition for Rehearing, which was denied on November 3, 2006 (Pet. App. at 3a – 4a). The Mandate, due to issue on November 10, 2006, was stayed on November 16, 2006 pending Walker's present application for a writ of certiorari before this Court (Pet. App. at 1a – 2a).

REASONS FOR DENYING THE PETITION

I. The Court Has No Jurisdiction to Review Walker's Claims Against Menist and Stewart.

As noted above, Walker filed two appeals. The final decision of the first appeal on the issue of whether the court abused its discretion in dismissing his case for failure to prosecute is the Court of Appeal's Order dated April 6, 2006 (Pet. App. at 11a). The only subsequent continuation of the case is related to Seldman's motion to release the notice of *lis pendes* and for attorneys' fees and costs, which is the subject of the Second Appeal. Menist and Stewart are not parties to the Second Appeal. The final decision in the Second Appeal, the Order of November 3, 2006 denying Walker's Petition for Rehearing or Rehearing *En Banc*, is the one that is the subject of this Petition for Writ of Certiorari (Pet. at p. 16).

It was only after Walker exhausted all appeals on the issue of the dismissal of his case for want of prosecution that the Superior Court would consider Seldman's motions related to the *lis pendes* and fees (Pet. App. at 25a). The Order of April 13, 2006 granting Seldman's motions stated, "[t]here has now been entered a final judgment of dismissal, and

Plaintiff [Walker] has exhausted all rights of appeal" (Pet. App. at 14a). Thus, the time for filing a Petition for Writ of Certiorari began to run from the date of the final order, April 6, 2006. Walker's Petition filed on February 1, 2007 was not within the 90-day requirement and is thus untimely. Sup.Ct. R. 13(1). This Court should decline to review this Petition as to Menist and Stewart for want of jurisdiction. *See, e.g. Bowles v. Russell*, 127 S.Ct. 2360 (2007); *Clark v. Florida*, 475 U.S. 1134, 106 S.Ct. 1784 (1986).

II. Walker Fails to Establish "Compelling Reasons" to Grant the Petition.

In exercising judicial discretion on whether to review a writ of certiorari, this Court considers a number of reasons characterizing the petition, none of which are applicable here. The reasons for review outlined in Supreme Court Rule 10 read as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Walker cites to no case in conflict with another, or to a court that has decided an important federal question. The Superior Court, in this instance, dismissed Walker's case for his failure to prosecute his case pursuant to Super. Ct. Civ. R. 41(b)(Pet. App. at 23a). Historically, discretionary decisions by a trial court related to granting a continuance are not reviewable on appeal. *See, e.g. Valdes v. Central Altagracia*, 225 U.S. 58, 32 S.Ct. 664 (1912); *Cox v. Hart*, 145 U.S. 376, 12 S.Ct. 962 (1892); *Spencer v. Lapsley*, 61 U.S. 264, 15 L.Ed. 902 (1857); *Barrow v. Hill*, 54 U.S. 54 (1851). Similarly, this court has ruled that the authority to grant a new trial was strictly an exercise of discretion for the trial court and not reviewable. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188 (1980). This standard procedural decision by a trial court exercising its sound discretion should not be subject to a constitutional challenge manufactured by Walker because he is unhappy with the trial court's decision.

III. The Facts of This Case Do Not Constitute a "Taking" Under the Fifth Amendment.

Initially, the arguments raised in Walker's Petition for Writ of Certiorari are novel and were not raised in the courts below. For this reason alone, they should not be considered. Additionally, the trial court never reached the merits of the claim as to whether the property at issue was residential, such that Walker had a right to cure the default. As such, Walker's argument regarding his statutory right of redemption cannot be considered on review as requested in his Petition.

Assuming *arguendo* that Walker preserved his constitutional arguments, they still must fail. Walker seeks to convince the Court that a civil action over his default on a promissory note wherein his property was properly foreclosed upon is a "taking" subject to Fifth Amendment protections entitling him to an "absolute right to counsel" (Pet. at pp. i, 16-20).

In the case below, Seldman exercised his rights pursuant to D.C. Code §42-815 to foreclose on the property securing his promissory note with Walker when Walker defaulted on the note. There is no claim that Seldman did not provide the requisite statutory notices prior to foreclosure. Statutes such as the District of Columbia's foreclosure statute are routinely upheld. In *Honeyman v. Hanan*, the Supreme Court stated, "[t]he Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided." *Honeyman v. Hanan*, 302 U.S. 375, 378, 58 S.Ct.273, 274, 82 L.Ed. 312 (1937). Recognizing the right of private

individuals to contract, District of Columbia statutes governing foreclosure procedures do not on their face violate due process clause of Fifth Amendment. *Bryant v. Jefferson Federal Savings and Loan Assn*, 509 F.2d 511, 166 U.S. App. D.C. 178 (1974).

The Fifth Amendment, cited by Walker in his Petition, is inapposite to the case at hand (Pet. at p. 2). Walker was not deprived of his property without due process of law, nor was his private property taken for public use without just compensation. As stated in *Bryant*, *supra*, the due process clause is a limitation on governmental, not private, action. *Id.*, 509 F.2d at 513, 166 U.S. App. D.C. at 180, *citing Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Where there is no evidence of significant governmental involvement, and where the agreement at issue is a private consensual agreement, the court should decline to review Walker's petition. *See*, *e.g. Young v. Ridley*, 309 F.Supp. 1308 (1970).

To the extent that Walker claims that the court below had an obligation to assign counsel, his argument has no merit. The court never ruled that Walker did not have a right to counsel; rather, it dismissed the case for his failure to prosecute after much consideration (Pet. App. At 18a – 25a). In this civil matter involving a property dispute, the court had no obligation to appoint counsel of the expense of the District of Columbia.

As further grounds for denial of the Petition, Menist and Stewart incorporate the arguments of respondent Neil Seldman in his Brief in Opposition, as if fully set forth herein.

CONCLUSION

Walker's effort to fashion a Constitutional claim from a routine foreclosure proceeding is not warranted under the circumstances of this case. Walker has no jurisdiction to seek review of the Superior Court's Orders regarding the dismissal of his case, and he has not established any compelling reasons for this Court to grant the Petition. Therefore, respondents Menist and Stewart respectfully request that the Petition be denied.

Respectfully submitted,

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No. 06-1615

In the

SUPREME COURT OF THE UNITED STATES

LE BON BRUCE WALKER,
Petitioner,

v.

NEIL SELDMAN, *et al.*
Respondents,

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Petitioner, Le Bon Bruce Walker ("Walker"), has raised three questions in his Petition for Writ of Certiorari which simply are not before this Court. Walker's questions presented and arguments bear on the merits of the dismissal of his case in the Superior Court of the District of Columbia; however, the merits of the dismissal of Walker's case was not before the District of Columbia Court of Appeals on the appeal to which this Petition has been filed.

At the heart of this case is a sole parcel of real property located in the District of Columbia (the "Property"). Walker owned the Property and Respondent, Neil Seldman ("Seldman") held a Deed of Trust securing the repayment of a loan in the amount of $174,000.00. When Walker defaulted on his payments under the terms of the loan, Seldman instituted foreclosure proceedings.

Walker subsequently filed suit in the District of Columbia against Seldman and the Trustees, Elizabeth Menist and Diane Stewart (the "Trustees"), alleging that Seldman and the Trustees had wrongfully foreclosed on the Property on the basis that he had the right to cure his default pursuant to D.C. Code § 42-815.01, which applied to residential property. The sole issue reserved for trial was whether or not the Property was Walker's primary residence and, thus, whether D.C. Code § 42-815.01 was applicable.

On the day of trial, Walker made an oral motion for continuance, which the trial court denied. Walker then chose not to proceed to trial, and his case was dismissed for failure to prosecute. Walker appealed to the District of Columbia Court of Appeals.

In Appeal No. 05-CV-1049 (the "First Appeal"), Walker challenged the Superior Court's discretion in denying his oral motion for continuance on the day of trial and dismissing his case for want of prosecution when he chose not to proceed with the trial.

The Court of Appeals subsequently granted Seldman's Motion for Summary Affirmance and denied Walker's Petition for Rehearing or Rehearing En Banc. The Court of Appeals issued its Mandate in the First Appeal on February 23, 2006, and Walker filed a Motion to Recall the Mandate, which the Court denied. Walker never petitioned this Court for a Writ of Certiorari following the First Appeal.

Prior to the First Appeal, Seldman had filed a Motion for Cancellation and Release of Notice of Lis Pendens and a Motion for Attorneys' Fees and Costs in the Superior Court. Seldman supported his Motion for Attorneys' Fees and Costs with a copy of the Deed of Trust at issue in this case, which provided that:

> "[i]n the event that Grantor [Walker] breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder [Seldman] from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note."

(Emphasis supplied). Seldman further supported his Motion with an Affidavit of G. Vann Canada, Jr., Esquire, along with a

true and correct copies of invoices and billing information evidencing Seldman's attorneys' fees, which were reasonably incurred by Seldman.

In an Order dated July 25, 2005, the Superior Court determined that Seldman was entitled to attorneys' fees and costs pursuant to the Deed of Trust that was foreclosed, and was mindful of "the prejudice created by the *lis pendens* and of the financial burden of having to advance his attorney's fees to defend against Plaintiff's action to set aside the foreclosure." See Petition for Certiorari, Appx. at 24. Nevertheless, the Court deferred ruling on the Motion for Cancellation and Release of Notice of Lis Pendens and Motion for Attorneys' Fees and Costs "until the time for noting an appeal from this order has expired or until the disposition of any appeal that may be taken." See Petition for Certiorari, Appx. at 25.

After the Court of Appeals issued its Mandate in the First Appeal, Seldman filed a Supplement to his Motion for Cancellation and Release of Notice of Lis Pendens and Motion for Attorneys' Fees and Costs in the Superior Court. In the Supplement, Seldman advised the Superior Court that the Court of Appeals had granted summary affirmance in favor of Seldman and had issued its Mandate. Seldman further provided a Supplemental Affidavit of G. Vann Canada, Jr., Esquire, along with a true and correct copy of additional invoices and billing information evidencing Seldman's additional attorney's fees and costs, which were reasonably incurred by Seldman, since the filing of his original Motion for Attorneys' Fees and Costs.

Walker filed an opposition to Seldman's Motion for Cancellation and Release of Notice of Lis Pendens and Motion for Attorneys' Fees and Costs. Although Walker challenged Seldman's entitlement to attorneys' fees and costs, he

presented no affidavits or other evidence to refute the reasonableness of attorneys' fees and costs claimed by Seldman.

In an Order dated April 13, 2006, the Superior Court granted Seldman's motions. The Court specifically held that:

> Defendant's motion for cancellation and release of the notice of lis pendens will be granted. Pursuant to D.C. Code § 42-1207(d), Defendant Seldman now has a final judgment of dismissal and he is entitled to an order canceling and releasing the notice of lis pendens.
>
> Defendant is also entitled to an award of attorneys' fees and costs. Plaintiff defaulted on his mortgage. Defendant Seldman foreclosed. Plaintiff filed this action seeking to set aside the foreclosure alleging, inter alia, wrongful foreclosure, conspiracy to commit fraud and unjust enrichment. Plaintiff's Deed of Trust provided, in pertinent part:
>
> > In the event that Grantor breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any

> counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note.

Plaintiff, to say the least, "does not prevail in that litigation." He narrowly escaped summary judgment and then elected not to proceed on the day of trial. There has now been entered a final judgment of dismissal, and Plaintiff has exhausted all rights of appeal.[1] The provision for attorneys' fees in the Deed of Trust is clear and unambiguous. The only question for the court is whether the fees requested are "reasonable." Concord Enterprises, Inc. v. Binder, 710 A.2d 219, 225 (D.C. 1998). The court has carefully scrutinized Defendant's statement of fees submitted by his counsel. The amount, while large, is fully justified by the nature of the litigation. The hours spent by counsel were reasonably necessary to defend the action brought by Plaintiff, and the hourly rate charged by the attorneys were certainly commercially reasonable considering the competence and experience of the attorneys involved.[2]

As the prevailing party, Defendant Seldman is entitled to an award of costs pursuant to Super. Ct. Civ. Rule 54(d). This covers filing fees and other ordinary court costs. Extraordinary costs are recoverable under 54-I. This certainly includes deposition transcripts, records search and fees for copying, and other expenses for material to be used at trial or necessary for the preparation of an adequate defense. Defendant

> Seldman also seeks costs for Westlaw research, long distance calls, travel to court, parking and the like. Whether or not the court would exercise its discretion to award these amounts pursuant to Rule 54-I, they are plainly reasonable under the circumstances of this case and recoverable as a matter of contract under Paragraph 10 of the Deed of Trust.

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[1] It is both wrong and disingenuous for Plaintiff to argue that the dismissal of this action was not a judgment on the merits. Pursuant to Super. Ct. Civ. R. 41(b), the dismissal is an adjudication on the merits. Moreover, Plaintiff's election not to proceed to trial on April 25, 2005, deprived Defendants of their opportunity to demonstrate once and for all that Plaintiff's challenge to the foreclosure was without merit.

[2] At least some of the attorneys' fees charged were attributable to the rather haphazard way in which Plaintiff chose to litigate his action. Even a cursory review of the motions and orders in the court file demonstrates Plaintiff's numerous defaults in his discovery obligations and failure to prosecute his case with reasonable diligence.

See Petition for Certiorari, Appx. at 13-16.

Pursuant to the April 13, 2006, Order, the Superior Court:

> Ordered that, pursuant to D.C. § 42-1207(d), the judgment shall expressly provide that the notice of lis pendens recorded in the Land Records of the District of Columbia Recorder of Deeds as instrument no. 58964 on May 14, 2003, is cancelled and released; and it further
>
> Ordered that the judgment for Defendant Seldman shall include the award of attorney's fees in the amount of $91,702.50 and costs in the amount of $3,367.05, plus the cost of canceling and releasing the notice of lis pendens, plus interest on these amounts at the statutory rate from the date of judgment.

Walker subsequently filed another appeal to the District of Columbia Court of Appeals, docketed as 06-CV-479 (the "Second Appeal"). The Court of Appeals granted Seldman's Motion for Summary Affirmance in the Second Appeal, denied Walker's Petition for Rehearing or Rehearing En Banc, and the present Petition for Certiorari ensued.

II. ARGUMENT

Petitioner, Le Bon Bruce Walker ("Walker"), has raised three questions in his Petition for Writ of Certiorari which simply are not before this Court. Walker's questions presented and arguments bear on the merits of the dismissal of his case in the Superior Court of the District of Columbia; however, the merits of the dismissal of Walker's case was not before the District of Columbia Court of Appeals in Walker's Second Appeal to which this Petition has been filed.

The merits of the dismissal of Walker's case had been the subject of Walker's First Appeal to the District of

Columbia Court of Appeals. Because Walker failed to petition this Court subsequent to the decision in the First Appeal granting Seldman's Motion for Summary Affirmance, all arguments raised by Walker in the present Petition should be deemed waived.

The sole issues before the Court of Appeals of the District of Columbia in Walker's Second Appeal was whether or not the lower court properly cancelled and released the Notice of Lis Pendens recorded by Walker, and whether the lower court properly granted Seldman's Motion for Attorney's Fees and Costs. Clearly, the District of Columbia Court of Appeals properly granted summary affirmance in favor of Seldman on those issues.

A. The Superior Court Properly Entered A Judgment Cancelling and Releasing the Notice of Lis Pendens pursuant to the Express Provisions of D.C. Code § 42-1207.

Notices of Lis Pendens in the District of Columbia are governed by the provisions of D.C. Code § 42-1207. Pursuant to D.C. Code § 42-1207(d), "if judgment is rendered in the action or proceeding against the party who filed the notice of the pendency, the judgment shall order the cancellation and release of the notice at the expense of the filing party as part of the costs of the action or proceeding. When appropriate, the Court may also impose sanctions for the filing."

A court is to give effect to the plain meaning of clear and unambiguous language contained within a statute. Leonard v. District of Columbia, 801 A.2d 82, 84 (D.C. 2002). It is well-settled law that the word "shall" used in a statute is a term which creates a duty, not an option. Parrish

v. District of Columbia, 718 A.2d 133 (D.C. 1998). Thus, the normal rule is that verbs used in statutes, such as "must" or "shall," denote mandatory requirements unless such construction in inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. Leonard, 801 A.2d at 84-85 (D.C. 2002) (citing Riggs Nat'l Bank of Washington, D.C. v. District of Columbia, 581 A.2d 1229, 1257 (D.C. 1990)).

There is no dispute in this case that Walker filed for recordation a Notice of Lis Pendens among the Land Records of the Recorder of Deeds of the District of Columbia referencing the present action. There is further no dispute that judgment was rendered against Walker in the present action. Consequently, by virtue of the express language of D.C. Code § 42-1207(d), the Superior Court was required to order the cancellation and release of the Notice of Lis Pendens at the expense of Walker as part of the costs of this action.

B. The Superior Court Properly Entered A Judgment For Attorneys' Fees and Costs Against Walker.

Under the "American Rule," each litigant bears his or her own attorneys' fees and litigation expenses. An exception to this "American Rule" arises, however, when the parties allocate the fees and expenses among themselves by contract. Concord Enterprises, Inc. v. Binder, 710 A.2d 219, 225 (D.C. 1998). Thus, where a contractual agreement expressly provides for the payment of attorneys' fees, the trial court's discretion is limited to ascertaining what amount constitutes a reasonable fee award. Id. In other words, absent public policy considerations or other unusual circumstances, the duty of the trial court is to give meaning to the full agreement of the parties, as interpreted by

controlling case law. Id. Consequently, when a Deed of Trust awards to a lender all costs and expenses of litigation arising out of the Deed of Trust, such a provision will generally be in force so long as it does not reimburse a party for greater than reasonably incurred expenses. Id.

The determination of whether an award of attorneys' fees is an appropriate amount is a matter addressed to the trial court's sound discretion. Assoc. of American Railroads v. Connerton, 723 A.2d 858, 864 (D.C. 1999). District of Columbia v. Jerry M., 580 A.2d 1270, 1280 (D.C. 1990). An award of attorneys' fees will be reversed "only upon an `an extreme showing . . . that an award is so arbitrary as to constitute an abuse of discretion.'" Connerton, 723 A.2d at 864 (quoting Bagley v. Foundation for the Preservation of Historic Georgetown, 647 A.2d 1110, 1115 (D.C. 1994)). "`Moreover, a request for attorney's fees should not result in second major litigation.'" Id.

This case was instituted by Walker in an attempt to set aside a foreclosure under the terms of a Deed of Trust and Note which he executed in favor of Seldman. There is no dispute that the Deed of Trust at issue provided that:

> [i]n the event that Grantor [Walker] breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder [Seldman] from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note.

(Emphasis supplied).

Based upon the above-captioned language, the Court properly determined that the language of the Deed of Trust was clear and unambiguous and that Seldman was entitled to attorneys' fees and costs because Walker did "not prevail" in this action when judgment was entered against him. Consequently, under the principles enunciated in Concord Enterprises, Inc. v. Binder, supra, the Superior Court's discretion was limited to ascertaining what amount constituted a reasonable fee award for Seldman under the express language of the Deed of Trust.

The Superior Court clearly exercised proper discretion in determining the amount owed to Seldman. Seldman presented the Superior Court with all of his invoices and billing information supported by Affidavits executed by G. Vann Canada, Jr., which set forth in detail all legal tasks, time, billing rates and charges, which were directly related to the litigation and which were reasonable and necessary under the circumstances. Although Walker challenged Seldman's entitlement to attorneys' fees and costs, he presented no affidavits or other evidence to refute the reasonableness of attorneys' fees and costs claimed by Seldman. In its opinion, the Court stated that:

> The court has carefully scrutinized Defendant's statement of fees submitted by his counsel. The amount, while large, is fully justified by the nature of the litigation. The hours spent by counsel were reasonably necessary to defend the action brought by Plaintiff, and the hourly rate charged by the attorneys were certainly commercially reasonable considering the

> competence and experience of the attorneys involved.[2]
>
> As the prevailing party, Defendant Seldman is entitled to an award of costs pursuant to Super. Ct. Civ. Rule 54(d). This covers filing fees and other ordinary court costs. Extraordinary costs are recoverable under 54-I. This certainly includes deposition transcripts, records search and fees for copying, and other expenses for material to be used at trial or necessary for the preparation of an adequate defense. Defendant Seldman also seeks costs for Westlaw research, long distance calls, travel to court, parking and the like. Whether or not the court would exercise its discretion to award these amounts pursuant to Rule 54-I, they are plainly reasonable under the circumstances of this case and recoverable as a matter of contract under Paragraph 10 of the Deed of Trust.
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> ---
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> [2] At least some of the attorneys' fees charged were attributable to the rather haphazard way in which Plaintiff chose to litigate his action. Even a cursory review of the motions and orders in the court file demonstrates Plaintiff's numerous defaults in his discovery obligations and failure to prosecute his case with reasonable diligence.

See Petition for Certiorari, Appx. at 15-16.

Based upon the undisputed evidence before the Superior Court and its careful consideration of Seldman's

claim for attorneys' fees and costs, as set forth above, there is no question that the lower court properly exercised its discretion. There is absolutely no basis in the record which could support a finding that the Superior Court's award was so arbitrary as to constitute an abuse of its discretion. Under these circumstances, the District of Columbia Court of Appeals properly granted Seldman's Motion for Summary Affirmance.

III. CONCLUSION

For the foregoing reasons, Respondent, Neil Seldman respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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Rockville, Maryland 20850
(301) 762-1600

Attorneys for Respondent, Neil Seldman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July, 2007, three (3) copies of the foregoing was mailed via first class mail, postage prepaid, to the following:

Le Bon Bruce Walker
203 Seaton Place, NE
Washington, DC 20002

Mary K. Gogoel, Esquire
HUDGINS LAW FIRM
515 King Street, Suite 400
Alexandria, Virginia 22314

_____
Rachel T. McGuckian, Esq.

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(5)

No. 06-1615

FILED
OCT 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

SUPREME COURT OF THE UNITED STATES

IN RE PETITION OF
LE BON BRUCE WALKER,
Petitioner,

v.

NEIL SELDMAN, ESQUIRE
ELIZABETH MENIST,
DIANE STEWART,
Respondents.

On Petition for Writ of Certiorari
to the District of Columbia Court of Appeals

PETITION FOR REHEARING

Le Bon Bruce Walker, pro se
203 Seaton Place, NE
Washington, DC 20002
(202) 491-2940

PETITION FOR REHEARING

Petitioner Le Bon Bruce Walker ("Walker") respectfully submits this Petition for Rehearing and asks this Court to revisit the issue outlined in his Petition for a Writ of Certiorari at Argument No. II under Reasons for "Granting the Petition" on the important issue of whether the due process Clause of the Fifth Amendment to the United States Constitution provides an equal right to counsel for persons proceeding in matters involving the loss of real property as it does for accused persons. In other words, should the courts in territories or non-states where the Fifth Amendment to the U.S. Constitution provides due process protections apply the same heightened rights to persons' real property rights as it does to persons accused of a crime? Petitioner maintains that it should.

Petitioner certifies that the grounds herein are limited to an intervening circumstance of substantial or controlling effect not available when the Petition for a Writ of Certiorari was first filed.

In March 2007, Congress rejected the Bill entitled the "DC Fair and Equal House Voting Rights Act of January 2007". As a result, District of Columbia residents still technically receive their due process rights under the Fifth Amendment to the United States Constitution which contains no Equal Protection of the Laws Clause found in the Fourteenth Amendment to the U.S. Constitution. DC residents are not any closer to receiving the rights afforded to residents of States under the Equal Protection of the Laws Clause in the Fourteenth Amendment that Congress must enforce and that the State Courts must adhere to in applying due process protections in civil matters. Petitioner maintains that the DC Superior Court's dismissal of his action for want of prosecution, where the Court placed him in the "catch - 22" position of proceed without counsel or receive an adverse ruling regarding his valuable real property denied to him the equal protection of the laws under the 14th Amendment to the U.S. Constitution. Moreover, Petitioner contends that the DC Courts are under no technical obligation to enforce the heightened due process protections to legal counsel under the Fifth Amendment because the matter was a civil case

not a criminal case.

Petitioner believes that the language of the Fifth Amendment guarantees a right to counsel, particularly in matters involving the deprivation of valuable real property (such as the highly valued real estate in the District of Columbia). In essence, Petitioner maintains that even a civil litigant proceeding in a matter involving his or her real estate and in the absence of any applicable equal protection of the laws clause to enforce a right to counsel should be given the same right as a person proceeding on a criminal matter. Walker should not have been forced as a pro se litigant to make the decision to proceed without counsel.

The Due Process Clause of the Fifth Amendment to the United States Constitution Provides an Equal Enforcement Right to Counsel for Persons Proceeding on Matters Involving Real Property as it does for Persons Accused of Crimes

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when it actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The words of the Fifth Amendment to the United States Constitution strictly construed may be interpreted to mean that any deprivation of rights be it over one's person or property invokes street adherence to the due process clause to an automatic right to counsel in controversies no person should request counsel and not be given the opportunity to obtain

representation by the Court.

In territories or non-states such as the District of Columbia, the due process clause of the Fifth Amendment applies to these municipalities. There is no equal protection of the laws clause contained in the Fifth Amendment. This Amendment is a restraint on the legislative and on the executive and judicial powers of government. Courts should be required to guarantee the absolute right to representation by counsel in civil matters involving real property as it does for accused persons. *Miranda v. Arizona,* 384 U.S. 436(1966); *Wright v. Davidson,* 181 U.S. 371, 384 (1901); *Murray's Lessee v. Hoboken Land and Improvement Co.,* 59 U.S. (18 How.) 272, 276 (1856). Indeed, the desire to protect one's property was foremost in the minds of the people when the United States Constitution was framed.

In the instant case, the trial court in the District of Columbia dismissed Petitioner's claims to ownership of his property because he would not argue his case without counsel. Walker maintains that the circumstances that brought him to the point where he stood without legal representation on the day of his trial, nor the fact that the Defendants stood ready to proceed to trial on that day should have formed the basis for the Court's cavalier attitude towards him. Here, the trial court made it clear that he had to proceed to trial with or without counsel or have his case dismissed. (See Petition for Cert Writ at 2-13). The very fact that the trial court failed to grant a continuance to Petitioner or advise and give him adequate time to get legal counsel before it proceeded to conduct the trial constitutes a violation of Walker's due process rights under the Fifth Amendment to the U.S. Constitution.

Petitioner submits that the courts in instances where a criminal matter is not involved are not really required to enforce the provisions of the Fifth Amendment even though the tribunals are located in areas that are not States. Walker argues as he did in his Petition for a Writ of Certiorari that the Fifth Amendment should be read to mean that every component of this Amendment whether it involves due process protections in criminal

proceedings or real property issues should have the same force with respect to the right to counsel and the court making every attempt to facilitate that right. No person should stand before a court governed by the provisions of the Fifth Amendment to the U.S. Constitution and be forced to proceed without counsel or risk an adverse decision.

It is a total abridgment of one's rights to have to defend himself in his own proper person against the taking of his real property. This is a grey area and this Court's denial of the Petition for a Writ of Certiorari on this issue was perhaps misplaced. If an accused has a right to counsel to the extent that courts do not allow such a person to proceed without counsel, before *advising* such a person of this right then persons proceeding in matters involving their real property should have the same rights.

The right to own and protect one's real property is a valuable one protected by the Fifth Amendment to the United States Constitution in the District of Columbia. Any proceeding that could result in a loss of property be it real property or otherwise (i.e. liberty interests, etc.) must be governed by heightened due process protections which include a right to counsel facilitated by the Court. In the District of Columbia, real property values have skyrocketed and the District is not a state; it does not have strictly, speaking, the Equal Protection of the Laws Clause inherent in the Fourteenth Amendment to the U.S. Constitution as States do. *Marbury v. Madision,* 5 U.S. 137, 174 (1803); *South Carolina v. United States,* 199 U.S. 437, 438 (1905); *Gibbons v. Ogden,* 22 U.S. 1 (1824),

The situation if left unprotected by the due process clause of the Fifth Amendment as to the heightened right to counsel, opens up the passageway for privacy and homelessness. This Court should rehear and grant the Petition for a Writ of Certiorari on all of the issues raised but particularly on this issue.

CONCLUSION

Petitioner prays that this Court grant Rehearing on this issue.

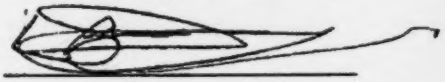
Respectfully submitted,
Le Bon Bruce Walker, pro se
203 Seaton Place, NE
Washington, DC 20002
(202) 491-2940

DATED: October 25, 2007
RE SUBMITTED: November 13, 2007

CERTIFICATION OF PETITIONER

I hereby certify that this Petition for Rehearing is filed in good faith and not for purposes of delay.

Respectfully submitted,



Le Bon Bruce Walker